

Dean (Migration) [2024] AATA 1062 (22 April 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Sifaud Dean
REPRESENTATIVE:	Mr Nilesh Nandan (MARN: 0104983)
CASE NUMBER:	2005362
HOME AFFAIRS REFERENCE(S):	BCC2017/2288288
MEMBER:	Brygyda Maiden
DATE:	22 April 2024
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2) of Schedule 2 to the Regulations; and • cl 820.221(1)(a) of Schedule 2 to the Regulations.

Statement made on 22 April 2024 at 8:08am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) ("the Act").
3. The applicant, a Fijian national, applied for the visa on 28 June 2017 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) ("the Regulations"). The primary criteria must be satisfied by at least one applicant.
4. The delegate refused to grant the visa on the basis that the delegate was not satisfied that the visa applicant continued "...to be the spouse of an Australian citizen, Australian permanent resident or eligible New Zealand citizen as outlined in subclause 820.211(2) and as defined in Section 5F [of the Act], I am not satisfied that you meet the requirements of subclause 820.221(1)."
5. In this case, no hearing was necessary as the Tribunal was able to decide the review in the applicant's favour on the basis of the material in front of it.¹
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant continues to be the spouse (as defined under s 5F of the Act) of an Australian citizen, Australian permanent resident or eligible New Zealand citizen sponsor.

Are the parties in a spouse or de facto relationship?

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen. A copy of the bio pages of her Australian passport and a copy of her birth registration in New South Wales were submitted to the Tribunal.
9. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

¹Section 360(2)(a) of the Act.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. A copy of the parties' New South Wales *Births Deaths and Marriages Registration Act 1995* marriage certificate was submitted to the Tribunal indicating that the parties were married on 15 April 2017. A copy of the parties' Islamic Marriage Contract also appears on the Department file. On the evidence, the Tribunal finds that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

11. Since the delegate's decision, the Tribunal has had the benefit of significant evidence that has been submitted by the applicant to the Tribunal.
 12. ***Financial aspects of the relationship - including joint ownership of real estate or other assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses***
13. The applicant submitted a used vehicle contract indicating that the parties purchased a Subaru on 18 April 2022. That document shows the parties' address as Boston Close, Hinchinbrook, New South Wales. No certificate of registration was submitted.
14. According to the sponsor's statutory declaration dated 9 August 2022, the parties have and continue to have joint accounts with St George and ANZ since 2017. Statements were submitted in support of this position including statements for 2024.
15. According to the sponsor's statutory declaration dated 9 August 2022, bills come out of the parties' joint account. A letter from the sponsor to the Tribunal dated 23 May 2023 states that the parties pay all the utility bills which are under the sponsor's parents' name as the parties reside in the sponsor's parents' house. The parties wages are deposited into their joint account. Both parties contribute \$150 weekly for groceries. The sponsor's letter to the Tribunal states that the parties "*were contributing \$150 each weekly for groceries but since I fell pregnant, Sifaud is doing all himself* [sic]." The sponsor's letter to the Tribunal dated 10 April 2024 states that the parties "*have a joint Bank account with ANZ & St George Bank since we got married. Our wages are directly sent to these accounts. We have multiple savings account* [sic] *like holiday & house deposit.*" The applicant pays for utilities and paid for the IVF costs as the sponsor has worked part time for the last three years. The sponsor pays for Netflix, Foxtel and medical insurance. The parties' contribution to various expenses is consistent with the applicant's letter to the Tribunal dated 10 April 2024.
16. After considering the evidence before it, the Tribunal is satisfied that the parties have purchased a vehicle together (though the registration certificate was not submitted) however there is no evidence before the Tribunal that the parties have purchased any real estate together or have any joint liabilities. There is no evidence of any legal obligations owed from one party to the other, but there is evidence of pooling of financial resources by way of the parties' various joint accounts, one of which has their respective wages deposited into it. There is evidence of the parties sharing day-to-day household expenses and the sharing of those expenses has changed depending on how each party's life circumstance has change. The financial aspects of the parties' relationship at the time of application do not provide strong support for the parties being in a genuine and continuing relationship, however, there is some evidence of the financial aspects of the parties' relationship at the time of decision which provides some support for the parties being in a genuine and continuing relationship.

17. Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework

18. The applicant submitted a New South Wales *Births Deaths and Marriages Registration Act 1995* birth certificate which shows that the parties are the parents of a daughter born in November 2023. Photographs were submitted (including for example): of the sponsor in a hospital bed and the applicant in scrubs sitting next to her, the applicant holding a baby next to the sponsor who is in a hospital bed, a picture of a baby in a car seat, photographs of the parties in the hospital including with others, a photograph of the parties in a bedroom with a cot with their daughter's name on the wall. The Tribunal affords the parties' common child significant weight.
19. In relation to the parties' living arrangements, according to the letter from the sponsor to the Tribunal dated 23 May 2023 the parties have always lived together, and have done so since they were married in 2017. According to the sponsor's letter to the Tribunal dated 10 April 2024, the parties have lived together with her parents since 2017. This is consistent with the statutory declarations of the sponsor's parents Ms Kurshid Saheed and Mr Mohammed Saheed discussed below who live at Boston Close, Hinchinbrook, New South Wales.
20. According to the sponsor's statutory declaration dated 9 August 2022 the parties share household chores like *"cooking, washing the dishes, washing and hanging the clothes on the line plus more"*. The applicant's statutory declaration dated 9 August 2022 states that the sponsor cooks and wash clothes and the applicant has to wash the dishes and clean up the kitchen.
21. The letter from the sponsor to the Tribunal dated 23 May 2023 states that since the sponsor became pregnant the applicant has taken over household duties to give her *"complete rest"*. The Tribunal accepts this evidence given the parties' fertility issues (discussed below). The applicant's letter to the Tribunal dated 10 April 2024 indicates that the parties have changed their responsibilities for housework depending on other goings on in their lives, the applicant states: *"...my role is to wash dishes, clean house, maintaining lawn and look after everyone's cars, servicing etc at home. Rozina does the cooking, laundry and other little stuff but since Layla was born, Rozina mostly spends time with her, and I take care about [sic] the rest. We both do weekly groceries together. We're also getting a lot of help with household stuffs [sic] from Rozina's parents."* The Tribunal affords this some weight.
22. The Tribunal is satisfied that at the time of application and time of decision the parties continue to live together with the sponsor's parents, and share household chores which they change depending on their current life circumstances. At the time of decision, the parties are parents to a common daughter. The Tribunal gives the nature of the parties household at the time of application some weight and weight at the time of decision in supporting the parties being in a genuine and continuing relationship and having a mutual commitment to a shared life and living together and not separately and apart.

23. Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities

24. The applicant submitted a letter to the Tribunal dated 10 April 2024 indicating that the parties were engaged on 6 August 2016 and had a function with over 150 guests.
25. Photographs of the parties' and others during their wedding ceremony appear on the Department file as well as a copy of the parties' Islamic Marriage Contract. The applicant's letter to the Tribunal dated 10 April 2024 states that the parties were married in

front of over 300 guests. The applicant submitted screen shots of his Facebook account which shows that he is married to the sponsor.

26. The Department file contains form 888 statutory declarations from:
 - a. Ms Kurshid Saheed (the sponsor's mother) dated 19 June 2017. She indicates that she is living together with the parties in the one house, and indicates that the applicant is the sponsor's husband. She states that the applicant has made the sponsor's "*life more complete and content*", a difference in her happiness, and that sponsor is in love with the applicant. The applicant is loving and caring towards the sponsor.
 - b. Mr Mohammed Saheed (the sponsor's father) dated 19 June 2017. He indicates that the applicant is married to his youngest daughter. The parties and Mr Saheed stay in the same house. He has seen the difference that the applicant has made in the sponsor's overall life and happiness. He believes the applicant's love for the sponsor is genuine. The applicant is loving, and caring towards the sponsor and a responsible husband. The sponsor has expressed her love for the applicant to Mr Saheed.
27. Updated form 888 statutory declarations were submitted by the applicant from:
 - a. Ms Kurshid Saheed dated 29 June 2022. The Tribunal notes that this declaration was not witnessed. Ms Saheed confirms that the parties are still living with her and have been for "*a long time*". She claims that the applicant loves the sponsor, the parties spend a lot of time together, holiday together (like Dubai and Singapore) and go on road trips. The applicant supports the sponsor. The parties had been trying to have a baby and were booked in for IVF. The parties wanted to rent a property together but returned on her request due to her husband's health to support her and her husband.
 - b. Mr Mohammed Saheed dated 29 June 2022. The Tribunal notes that this declaration is not witnessed. Mr Saheed claims that the parties have lived together with them for five years. The parties are in love and go to dinner, on holidays and on road trips. The parties have been looking after them well. Mr Saheed has verbally promised that the parties can purchase Mr Saheed's house once they are ready. The parties have had difficulty conceiving naturally and are going through IVF.
28. Medical documents were submitted by the applicant pertaining to fertility treatment of the sponsor. In those documents which are dated 2021 and 2022 the sponsor's partner (or next of kin) is listed as the applicant. Documentation was also submitted indicating that the sponsor uses the applicant's surname.
29. A small number of photographs of the parties were submitted, including of the parties dining together, at birthday celebrations with others, having dinners with others, at traditional celebrations with others and in Dubai together in 2018. Some of these photographs appear to be on social media and they are liked and commented on by others. Additional photographs were submitted of what appears to be the parties at a wedding, at the beach, at various locations and out to dinner.
30. The sponsor's statutory declaration dated 9 August 2022 states that in 2018 the parties holidayed in Singapore and Dubai for three weeks. Social media posts indicate that the parties were travelling to Singapore together in 2018. Additional social media posts indicate that the parties spent Christmas 2022 in Port Macquarie and Coffs Harbour (photos were included on the post).

31. At the time of application and time of decision, there is evidence that the parties' represent themselves as being married to each other. There is little evidence at the time of application that the parties plan and undertake social activities, and significantly more at the time of decision. At both times, there is no evidence from the parties' friends and acquaintances about the nature of their relationship, but there is some evidence from the sponsor's parents. On balance, at the time of application although there is evidence of the social aspects of the parties' relationship, it does not provide strong support for the parties' being in a genuine and continuing relationship. At the time of decision there is more evidence than at the time of application of the social aspects of the parties' relationship which provides some support for the parties being in a genuine and continuing relationship.

32. *Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term*

33. According to the letter from the sponsor to the Tribunal dated 23 May 2023, in relation to how the parties' relationship came to be, the parties first spoke on the phone in March 2016 and eventually became friends. The sponsor came to know the applicant through his cousin who is her mother's friend. The sponsor, accompanied by her parents, travelled to Fiji in July 2016 and the applicant picked them up from the airport. During the sponsor's time in Fiji the parties spent every day together and had dates on most nights. The parties were engaged on 6 August 2016 with 150 people attending. The sponsor returned to Sydney and the applicant went to Tokyo to finish work. The parties were married on 15 April 2017 in front of 300 guests. It appears that the parties' relationship commenced in July 2016 given that they were engaged in August 2016 after meeting in person in July. At the time of application, the parties' had been in a relationship for a bit under a year which the Tribunal affords a small amount of weight to, and at the time of decision the parties have been in a relationship for almost eight years, which the Tribunal affords significant weight to.

34. Chat records were submitted claimed to be between the parties – it is clear to the Tribunal that the parties communicate with each other.

35. According to the sponsor's statutory declaration dated 9 August 2022, the parties' relationship began in 2017, and at that time the parties had lived together for 5 years and six months. The parties are saving up to purchase her parent's home in 2024 (which appears to be consistent with her father's unwitnessed statutory declaration). Numerous pieces of correspondence were sent to both parties at Boston Close, Hinchinbrook in 2022 and 2023. Correspondence was also sent to the address to each party in 2024. According to the letter from the sponsor to the Tribunal dated 23 May 2023 the parties have always lived together, and have done so since they were married in 2017. The applicant's letter to the Tribunal dated 10 April 2024 states that he moved in with the sponsor and her parents immediately following the parties' wedding. The Tribunal accepts that at the time of application the parties had lived together for two months which the Tribunal affords a small amount of weight to. At the time of decision, the parties have been living together for almost seven years which the Tribunal affords significant weight to.

36. The Tribunal accepts that the parties have given each other emotional support through their IVF and the sponsor's ultimate pregnancy journey. Medical evidence was submitted pertaining to the parties IVF. Copies of text messages to the parties indicate that they had eleven fertilised eggs that were being frozen. Both parties' letters to the Tribunal dated 23 May 2023 and the applicant's letter to the Tribunal dated 10 April 2023 discuss the difficulty with they faced with two failed IVF attempts and the procedures that the sponsor had to endure. The Tribunal accepts this evidence and gives it weight.

37. Both parties' letters to the Tribunal dated 23 May 2023 discuss them being successful in relation to one of their future plans to have a child, and their next plan is to purchase the sponsor's parents' home. The applicant's letter to the Tribunal dated 10 April 2024 states that the parties *"have a mutual agreement with Rozina's parents in buying their property where me and Rozina have lived since April 15, 2017. Rozina's parents wanted us to save as much as we can so we're comfortable after buying a house. We have already started renovating the house and will conclude the deal with her parents by the end of 2025."* The sponsor's letter to the Tribunal dated 10 April 2024 is substantially similar.
38. In respect of the nature of the parties' commitment to each other, at the time of application, the parties' had been in a relationship for a bit under a year and lived together for two months. There is a small amount of evidence of the degree of companionship and emotional support that the parties' draw from each other and some evidence, in particular the decision to marry which is generally accepted as a committed to the future of a party's relationship and that the parties see the relationship as long term. At the time of decision the parties have been in a relationship for almost eight years and lived together for almost seven years. There is evidence that the parties' provide each other with companionship and strong evidence that the parties have provided each other with emotional support through the parties' inability to conceive a child naturally. There is evidence that the parties see the relationship as long term with the birth of the parties' daughter and the parties' plans to purchase the sponsor's parents' home. At the time of application there is a small amount of evidence as to the nature of the parties' commitment to each other which does not provide strong support for the parties being in a genuine and continuing relationship, having a mutual commitment to a shared life, and living together and not separately and apart on a permanent basis. At the time of decision, there is significantly stronger evidence as to the nature of the parties' commitment to each other which provides support for the parties' being in a genuine a continuing relationship, having a mutual commitment to a shared life and living together and not separately and apart on a permanent basis.

39. **CONCLUSION**

40. On the basis of the above and on balance after considering the reg 1.15A(3) matters, the Tribunal is satisfied that the requirements of s 5F(2) of the Act are met at the time the visa application was made and at the time of this decision.
41. Therefore the applicant meets cl 820.211(2) and cl 820.221(1)(a) of Schedule 2 to the Regulations.
42. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

43. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(2) of Schedule 2 to the Regulations; and
 - cl 820.221(1)(a) of Schedule 2 to the Regulations.

Brygyda Maiden
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).